No. 78-1945

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
PETITIONER

v.

STANLEY E. COUTU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Davis-Bacon Act confers a private right of action for back wages against a contractor in favor of an employee who has performed work under a contract that has been administratively determined not to call for Davis-Bacon work and that accordingly does not contain prevailing wage specifications.

INTEREST OF THE UNITED STATES

The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, requires the payment of prevailing wages, as determined

by the Secretary of Labor, to laborers and mechanics employed under certain federal construction contracts. This case involves the question whether a worker may sue the contractor to challenge the contracting agency's determination that the contract under which he is employed is not subject to the Act.

This issue is of substantial importance to the United States. The Davis-Bacon Act is administered by the Department of Labor and the various federal agencies that enter into construction contracts. The Court's decision may thus affect the administration of a large number of government contracts. In recognition of the government's substantial interest in the question presented, the Court requested our views at the petition stage in this case and in *University of Chicago* v. *McDaniel*, cert. denied, 434 U.S. 1033 (1978), which involved a similar issue.

STATUTES INVOLVED

The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, is set forth in pertinent part at Pet. App. D.

Section 2 of the Miller Act, 40 U.S.C. 270b, provides:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to

prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. * * *

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

STATEMENT

1. The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, requires that all federal contracts in excess of $2,000 for "construction, alteration, and/or repair * * * of public buildings or public works" contain a provision obligating the contractor and its subcontractors to pay laborers and mechanics employed thereon not less than the wages prevailing in the locality, as determined by

the Secretary of Labor (40 U.S.C. 276a(a)). The Act also requires that such contracts contain a provision authorizing the contracting officer to withhold from the contractor amounts that are sufficient to pay workers the difference between the wage rates required by the contract and the wage rates actually received (*ibid.*). The Act directs the Comptroller General to use the withheld funds to pay workers any wages found due under the Act (40 U.S.C. 276a–2(a)).[1]

If the funds withheld are insufficient to make reimbursements in full, laborers and mechanics have the same right of action against the contractor and his sureties as that conferred by the Miller Act, 40 U.S.C. (and Supp. II) 270a *et seq.*, upon persons furnishing labor and material (40 U.S.C. 276a–2(b)). The Miller Act requires any person entering into a contract exceeding $25,000 for the "construction, alteration, or repair of any public building or public work of the United States" to furnish certain bonds to the United States, including a payment bond for the protection of persons supplying labor or material for use in the contract work (40 U.S.C. (Supp. II) 270a(a)(2)). Suits on these bonds may be brought by any person who has furnished labor or material in the performance of the contract and has not been paid in full within 90 days (40 U.S.C. 270b(a)). See generally *J.W. Bateson Co.* v. *Board of Trustees*, 434 U.S. 586 (1978).

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[1]The Act in addition provides administrative sanctions for failure to pay the specified minimum wages, including termination of the contract (40 U.S.C. 276a–1) and debarment of the contractor from future contract awards for a three-year period (40 U.S.C. 276a–2).

Subsequent to the enactment of the Davis-Bacon Act, Congress extended the Davis-Bacon prevailing wage requirements to federally-assisted construction contracts to which the United States is not a party. Thus, approximately 60 related statutes (see, *e.g.*, 29 C.F.R. Part 1, App. A) provide that contracts for federally-assisted construction must contain provisions that guarantee laborers and mechanics working under the contracts not less than the locally prevailing wages as determined by the Secretary of Labor. As a result of the Davis-Bacon Act and these related statutes, each year prevailing wage provisions are required to be included in thousands of contracts of various types (competitively bid, negotiated, fixed cost, cost plus, etc.) entered into or administered by many different government agencies.

In order to provide coordination of administration and consistency in the enforcement and application of the labor standards provisions of the Davis-Bacon and related Acts, President Truman promulgated Reorganization Plan No. 14 of 1950 (5 U.S.C. App., at 746). The Reorganization Plan directs the Secretary of Labor to "prescribe appropriate standards, regulations, and procedures" to be observed by the contracting agencies.[2] It further authorizes the Secretary

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[2]The Copeland Anti-Kickback Act, 40 U.S.C. 276c, provides the Secretary further authority in the administration and enforcement of the Davis-Bacon and related Acts by directing the Secretary to promulgate reasonable regulations for contractors and subcontractors, including a provision requiring the weekly submission of statements regarding the wages paid on covered work. Moreover, Section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259) provides that an employer shall not be subject to any liability for failure to pay wages required by the Davis-Bacon Act if he proves good faith reliance on "any written ad-

to make such investigations as he deems desirable to assure compliance with the enforcement of the labor standards. However, the President's message accompanying the Reorganization Plan states that "[t]he actual performance of enforcement activities, normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance." 5 U.S.C. App., at 746.

Pursuant to the Reorganization Plan, the Secretary of Labor has promulgated regulations implementing the Davis-Bacon and related Acts. See 29 C.F.R. Parts 1, 3, 5 and 7. Part 5 of the regulations provides guidelines for the application and enforcement of the labor standards provisions, including, for example, coverage definitions (29 C.F.R. 5.2).[3] The procurement regulations of the various contracting agencies contain additional guidelines concerning the application of the labor standards provisions, adapted to the requirements of the particular agencies.[4]

The initial determination as to whether a particular contract or group of contracts is covered by the Davis-Bacon Act or a related Act is made by the con-

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ministrative regulation, order, ruling, approval, or interpretation" of the Secretary of Labor. See also 29 C.F.R. 5.12.

[3]Part 1 provides procedures for the predetermination of prevailing wage rates. Part 3 was promulgated pursuant to the Copeland Act (see note 2, *supra*) and contains requirements for the submission of weekly payroll data and procedures governing payroll deductions. Part 7 concerns practice before the Wage Appeals Board, an administrative body designed to hear appeals of final administrative decisions made under Parts 1, 3 and 5.

[4]The Department of Energy regulations relating to the Davis-Bacon Act are found in 41 C.F.R. Subpart 9–18.7.

tracting agency (or the agency providing the federal funding). If the agency determines that a proposed contract is subject to the Davis-Bacon Act or a related Act, the agency either extracts a schedule of prevailing wages from those published in the Federal Register by the Department of Labor or, if no prevailing wage determination has been published for the relevant geographic area or type of construction, requests the Wage and Hour Division of the Department of Labor[5] to make a determination. The prevailing wage determination and the appropriate Davis-Bacon labor standards provisions are then incorporated in the invitation for bids and in any resulting contract. See 29 C.F.R. 5.5.

During the period of construction, the contracting agency or the Department of Labor may undertake an investigation in order to insure compliance with the labor standards provisions in the contract. If wage violations are found, the agency's contracting officer on his own initiative or upon the request of the Department of Labor may withhold amounts due the con-

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[5]29 C.F.R. 1.5. The regulations of the Department of Labor establish a procedure of administrative review of the Department's wage rate determinations, provided the wage rates are contested prior to award of the contract or subcontract at issue (29 C.F.R. 1.7). Any "interested person," which includes contractors, labor organizations, individual employees, and contracting agencies, may seek such review before the Wage Appeals Board, which acts finally for the Secretary of Labor on such matters. 29 C.F.R. 1.16 and Part 7. The correctness of the Secretary's prevailing wage determinations is not subject to judicial review. See, *e.g.*, *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 177 (1954). *Nello L. Teer Co.* v. *United States*, 348 F.2d 533, 539 (Ct.Cl. 1965), cert. denied, 383 U.S. 934 (1966); *Commonwealth of Virginia* v. *Marshall*, 599 F.2d 588, 592 (4th Cir. 1979); *Fry Bros. Corp.* v. *HUD*, 614 F.2d 732, 733 (10th Cir. 1980).

tractor that are sufficient to offset any violations.[6] Back wages due employees are paid from any amounts withheld from the contractor.

If a contracting agency determines that a contract is not subject to the Davis-Bacon Act or a related Act, it of course does not request a wage determination from the Department of Labor and does not include the Davis-Bacon labor standards provisions in the contract specifications. A contractor, labor organization or employee may appeal a final agency determination of non-coverage to the Department of Labor pursuant to 29 C.F.R. 5.12 and 7.9 at the bid solicitation stage prior to the agency's award of the contract.[7]

2. This case involves a contract between the United States and petitioner Universities Research Association, Inc., a not-for-profit consortium of universities.

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[6] Federal procurement regulations require the inclusion in covered contracts of a clause providing that disputes concerning the proper classification of laborers and mechanics or the applicability of the labor provisions of the contract will be referred to the Secretary of Labor for final determination (41 C.F.R. 1-18.703-1(i)). Moreover, questions involving the application or interpretation of the Department of Labor's regulations relating to the Act and of the Act's provisions must be referred to the Department of Labor for a ruling pursuant to 29 C.F.R. 5.12. See *North Georgia Building & Construction Trades Council* v. *Dep't of Transportation*, 399 F.Supp. 58 (N.D. Ga. 1975). An evidentiary hearing may be held in cases "involv[ing] significant sums of money, large groups of employees, or novel or unusual situations" (29 C.F.R. 5.11(b)). Any final agency action by the contracting agency or the Wage and Hour Division of the Department of Labor may then be appealed to the Wage Appeals Board (29 C.F.R. 7.9).

[7] The binding effect of the Department of Labor's determination on the contracting agency is the subject of some disagreement. Compare 43 Op. Att'y Gen. No. 14 (Mar. 9, 1979); 43 Op. Att'y Gen. No. 8 (Jan. 11, 1977); and 41 Op. Att'y Gen. 488 (1960) with 40 Comp. Gen. 565 (1961).

The contract (designated United States Contract No. AT (49–8)–3000) originally was negotiated by the Atomic Energy Commission. It later was assumed in turn by the Commission's successors, the Energy Research and Development Agency (ERDA) and the Department of Energy (DOE).[8] The contract requires petitioner to furnish scientific and technical management services to the United States in connection with the construction and operation of the Fermi National Accelerator Laboratory, a research laboratory located in Kane County, Illinois (Pet. Br. 3–4 & n.2).

The contract provides for the total funding of the project by the United States through the Department of Energy.[9] Petitioner is authorized to spend these funds (under DOE supervision) to construct, alter, and

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There is no administrative procedure now available expressly providing review, *after* a contract award, of an employee's claim that a contracting agency has made an incorrect Davis-Bacon coverage determination. However, Section 1.6(f) of proposed Department of Labor regulations (29 C.F.R. Part 1), published December 28, 1979 (44 Fed. Reg. 77029), provides for the post-award incorporation of wage determinations in contracts that do not originally include them. In addition, proposed Section 5.5(a)(9) (29 C.F.R. Part 5; 44 Fed. Reg. 77086 (1979)) includes disputes with employees in defining the types of labor standards disputes that must be resolved by the Department of Labor. The comment period for the proposed regulations expired on May 27, 1980. Several contracting agencies, including the Department of Energy, have objected to the proposed regulations, contending that the contracting agencies have final authority with respect to coverage determinations on a particular contract.

[8]See Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.*; Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.* The contract, now designated United States Contract No. EY-76-C-02-3000, remains substantially the same as originally negotiated.

[9]Congress has appropriated substantial funding for the Laboratory pursuant to 42 U.S.C. 2011 and 2051 *et seq.*

repair the laboratory and to employ scientific, technical, operational and administrative personnel necessary to its operation and administration. The contract terms track relevant DOE procurement regulations codified in 41 C.F.R. Chapter 9. The contract specifies the rates of compensation to be paid defined employee classifications. Prior to establishing any new classifications or adjusting the rates of compensation, petitioner must obtain approval from DOE.

With respect to the Davis-Bacon Act, Article XXXIII of the contract provides (Pet. App. A5):

> This contract does not contemplate the performance of work by [petitioner], with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

To implement this provision, DOE officials review specific work projects and make determinations regarding Davis-Bacon Act coverage upon the contractor's request. Such requests are reviewed under guidelines established in 41 C.F.R. Subpart 9–18.7 by a special DOE Davis-Bacon committee, which is composed of members with technical, administrative, and legal expertise.[10] If the committee determines that the

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[10] 41 C.F.R. 9–18.701–51 and 9–18.701–52 identify various types of contract work that are not covered by the Davis-Bacon Act—*e.g.*, "servicing or maintenance work in an existing plant, including installation or movement of machinery * * * and plant rearrangement, which involve[s] only an incidental amount of

work to be performed is covered by the Davis-Bacon Act, the contractor subcontracts the work. Conversely, if the committee determines that the project does not require Davis-Bacon work, the contractor performs the work with its own employees.

Respondent Stanley E. Coutu was employed by petitioner from September 25, 1972, until September 10, 1975. He occupied various positions within the "technician" classification established by DOE in the contract and was compensated in accordance with the contract-prescribed salary and benefit schedules for that classification.[11] Respondent's duties included monitoring computers, assisting scientific personnel, supervising accelerator operation and record keeping. When not occupied with those duties, he occasionally

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work * * * that would otherwise be considered construction, alteration and/or repair" (41 C.F.R. 9-18.701-51(a)(3)), and "[e]mergency work to combat the effects of fire * * * accident or other casualties, and to restart the operational activity following the casualty [except] [w]ork which is not directly related to restarting the activity or which involves rebuilding or replacement of structure or structural components or equipment" (41 C.F.R. 9-18.701-52(a)(6)). The regulation also gives examples of the application of the Act to specific situations (41 C.F.R. 9-18.750-2), noting, for example, that "[a]t the time of turnover of a DOE facility * * * from construction to operation activities, * * * the facility [may be] turned over a section at a time * * * . Usually, it is essential that final checkout of a plant prior to the start-up of plant operations be performed by personnel of the operating contractor, and, as such, is not covered. The important thing is to work out a practical plan that will assure: (i) safe and effective startup of the facility, (ii) the fulfillment of obligations under applicable statutes, and (iii) continuing construction at the facility." 41 C.F.R. 9-18.750-2(g)(2).

[11] The hourly rates specified by the contract for contractor employees, who are steadily employed, are somewhat less than the prevailing wages established by the Department of Labor for similar classifications of Davis-Bacon Act workers, who are typically employed intermittently.

made minor repairs to malfunctioning equipment, assembled prefabricated equipment and assisted in connecting power sources to experimental equipment. Respondent's supervisors typically were high-rated technicians, professional engineers and physicists.

3. Respondent commenced this action in the United States District Court for the Northern District of Illinois on April 9, 1975, on behalf of himself and a class of mechanics and laborers who had performed work under the contract, seeking damages in excess of $5 million on the theory that petitioner paid them less than the locally prevailing wages required by the Davis-Bacon Act for construction work (Pet. App. A1). The complaint was in seven counts: Count I alleged that petitioner had violated the Davis-Bacon Act by not paying the minimum wages required by the contract and the prevailing wage determinations of the Secretary of Labor (Pet. App. A13, A15). Count II alleged a breach of petitioner's obligations under a contract falling within the purview of the Davis-Bacon Act (*id.* at A13, A24). The remaining counts were based on allegations of common law fraud, restitution, and contractual indebtedness, for which pendent federal jurisdiction was alleged (*id.* at A13).

The district court (Judge McGarr) dismissed Count I because it found that respondent's allegations were "not totally borne out by the alleged Contract" (Pet. App. A15, A22, A24). Relying on the Seventh Circuit's decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583, vacated and remanded, 423 U.S. 810 (1975), reaff'd on remand, 548 F. 2d 689 (1977), cert. denied, 434 U.S. 1033 (1978), the district court denied petitioner's motion to dismiss Count II and the pend-

ent counts and granted respondent "leave to show that the Secretary of Labor through [DOE] has made Davis-Bacon Act determinations with respect to the alleged contract, and that [respondent] and the class have performed such work at [petitioner's] direction, pursuant to the contract" (Pet. App. A18).

Petitioner thereupon moved for summary judgment, submitting an affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory, which stated that "[n]o Davis-Bacon Act * * * stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in [the] Contract" (Pet. App. A24–A25). Respondent opposed the motion, contending that the omission of Davis-Bacon Act provisions from the contract amounted to a violation of the Act "which should not serve to shield [petitioner] from [respondent's] implied right of action found in *McDaniel* v. *University of Chicago*" (Pet. App. A25). The district court (Judge Leighton) granted summary judgment in favor of petitioner. The court observed that "no Davis-Bacon Act determinations have been made a part of this contract, requiring [petitioner] to pay [respondent] at wage rates contemplated by the Davis-Bacon Act" (Pet. App. A25–A26). After an examination of the statutory and regulatory framework of the Davis-Bacon Act, the court concluded that "it would be improper * * *to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties" (*id.* at A27).[12]

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[12]The court dismissed the pendent counts after granting summary judgment in favor of petitioner on Count II (*ibid.*).

The court of appeals reversed and remanded (595 F.2d 396 (1979); Pet. App. A1–A12) on the basis of its decision in *McDaniel*. The court reasoned (*id.* at A5):

> [T]wo theories of recovery remained open to [respondent] after Judge McGarr's dismissal [of Count I]: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. Judge Leighton's grant of summary judgment was based on the affidavit * * * tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against [respondent] and his class because the required wage stipulations were incorporated by operation of law.

In the court of appeals' view, "if the [petitioner] actually performed [Davis-Bacon] work with its own employees at the Fermi Laboratory, [respondent and his class] became entitled to the prevailing wages in Kane County where the work was to be performed. This conclusion follows from our holding in *McDaniel* v. *University of Chicago*, *supra*" (Pet. App. A6). The court rejected petitioner's contention that, assuming a private right of action exists under *McDaniel*, exhaustion of administrative remedies is a prerequisite to judicial relief (*id.* at A10). The court concluded that if on remand respondent could prove that he and his class had performed construction, alteration or repair work at the laboratory, they would be entitled "to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of

laborers and mechanics employed on similar projects in Kane County, Illinois" (*id.* at A12).[13]

SUMMARY OF ARGUMENT

The Davis-Bacon Act does not confer a private right of action for back wages against a contractor in favor of an employee who has performed work under a contract that has been administratively determined not to call for Davis-Bacon work and that accordingly does not contain prevailing wage specifications. Although the Davis-Bacon Act was passed for the especial benefit of construction workers (see *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 178 (1954)), there is strong evidence of a legislative intent to deny a private remedy such as that recognized by the court of appeals.

To begin with, the Davis-Bacon Act includes a specific judicial remedy on behalf of laborers—a suit on the Miller Act bond required for construction contracts—and it is therefore appropriate to presume that Congress did not intend the implication of other remedies. Moreover, in amending the Act in 1964 Congress refused to consider a proposal that would have provided for a private right of action and judicial review of agency determinations under the Act, thus evidencing both Congress' assumption that the existing statute does not provide such a private right of action and its intent to preclude that remedy. Indeed, it has long been settled that the Miller Act, on which the statutory remedy in the Davis-Bacon Act was mod-

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[13] The court of appeals also assumed that on remand the district court would decide the pendent claims presented in Counts III-VII of the complaint (*ibid.*).

eled, does not permit a private judicial remedy other than the one expressly provided.

Finally, it would be inconsistent with the statutory scheme to allow employees to bring an action seeking back wages, perhaps years after the contract has been let and the work completed, based on an allegedly incorrect agency coverage determination. The rights explicitly granted in the Davis-Bacon Act represent a balance between the often-competing goals of protecting laborers and promoting the efficiency and fiscal integrity of the government procurement process. A court-imposed alteration in the remedies available would upset this balance, because it would inject substantial uncertainty in an area—wage and coverage determinations—that requires uniformity and consistency.

In light of these considerations, the court of appeals erred in implying an additional private remedy for back wages under the Davis-Bacon Act. As this Court recently noted, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). Rather, "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

ARGUMENT

THE DAVIS-BACON ACT DOES NOT CONTAIN AN IMPLIED PRIVATE RIGHT OF ACTION IN FAVOR OF AN EMPLOYEE WHO ALLEGES THAT HE WAS NOT PAID THE PREVAILING WAGES REQUIRED BY THE ACT BECAUSE OF AN ERRONEOUS COVERAGE DETERMINATION

A. The Davis-Bacon Act does not confer an implied right of action against a contractor in favor of an employee for back wages under a contract that has been administratively determined not to call for Davis-Bacon work and that therefore does not include Davis-Bacon stipulations.[14] The court of appeals accordingly erred in holding to the contrary on the basis of its prior decisions in *McDaniel* v. *University of Chicago*, *supra*.

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[14]There is no need for the Court to decide in this case whether such a private right of action may be implied in favor of an employee under a contract that contains Davis-Bacon stipulations, but who has nevertheless not been paid the prevailing wages the Act requires. As we pointed out in our Amicus Brief in *University of Chicago* v. *McDaniel*, No. 76-1464, at pages 9-12, an employee who has not received the minimum wages that his employer has contracted with the government to pay should be able to recover in a suit on the contract as a third-party beneficiary. An employee should also be able to recover in a contract action if Davis-Bacon Act stipulations are inadvertently omitted from a contract, where the contracting agency concedes that the omission was erroneous. In that case, the Davis-Bacon stipulations would be deemed to be incorporated by operation of law. *G.L. Christian & Assoc.* v. *United States*, 312 F.2d 418 (Ct. Cl.), rehearing denied, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963).

Moreover, this case does not present the question whether an employee would have a cause of action against the government (either at the time of contract bid solicitations or thereafter) to challenge a final agency decision not to include Davis-Bacon Act specifications in a contract. We express no views on this question. Cf. note 7, *supra*.

The court of appeals' rationale for its present decision was explained in *McDaniel I* (512 F.2d 583, 587 (1975)):

> In a case in which the express remedies provided * * *, e.g., the withholding of accrued payments due the contractor by the government for direct payment to underpaid laborers and mechanics (40 U.S.C. § 276a(a)) and a suit on the required Miller Act payment bond (40 U.S.C. § 270b(a)), have proved ineffective, we should be especially "alert to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case* v. *Borak*, 377 U.S. 426, 433, 84 S. Ct. 1555, 1560, 12 L. Ed. 423 (1964).

In *McDaniel II* (548 F.2d 689 (1977)), the court of appeals reaffirmed its initial holding after reassessing the case, pursuant to this Court's directive (423 U.S. 180 (1975)), in the light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975), and *Cort* v. *Ash*, 422 U.S. 66 (1975). Applying the four factors identified in *Cort* to determine Congress' intent with respect to allowing a private right of action in a federal statute that does not expressly provide such a remedy, the court reasoned that (1) the Davis-Bacon Act was passed for the special benefit of laborers and mechanics; (2) Congress had impliedly recognized that laborers and mechanics could sue "at least as third-party beneficiaries of the contract required by 40 U.S.C. § 276a in state court or in federal court if there were proper jurisdiction" (548 F. 2d at 694);[15] (3) the

[15] The court relied in part for this conclusion upon its interpretation of the legislative history of the Portal-to-Portal Act provision that provides a two-year statute of limitations for "any cause of action for unpaid minimum wages * * * under * * * the Davis-Bacon Act" (29 U.S.C. 255). We discuss this provision at pages 25–29, *infra*.

remedies expressly provided by the Act were ineffective for accomplishing the statutory purpose; and (4) an action in federal rather than in state court is appropriate since "the right to recover the unpaid portion of the prevailing wages is based on the congressional choice of a federal policy" (*id.* at 695). The court accordingly concluded that "implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute" (*ibid.*).

In the present case the court of appeals merely noted that its decision "flow[ed] directly from the *McDaniel* opinions" (Pet. App. A2).

B. This Court's recent decisions emphasize that implication of a private right of action presents a question solely of "statutory construction." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). In resolving that question, the Court has held, it is necessary to determine "whether Congress intended to create the private right of action asserted." *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 568.

The Court has refocused the analysis in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), explaining that a right of action should not be implied simply because a majority of the standards specified in *Cort* has been met. Those standards are not of equal significance, and the central inquiry is "whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575. As the Court explained in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77–1645 (Nov. 13, 1979), slip op. 4:

> While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g.*, *J.I. Case Co.* v. *Borak*, *supra*, what must ultimately be determined is whether Congress intended to create the private remedy asserted* * *.

Thus, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 688. "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, *supra*, 422 U.S. at 578.

These decisions cast substantial doubt on the court of appeals' holding that an implied right of action for laborers and mechanics is necessary in order to further "the congressional purpose" in enacting the Davis-Bacon Act (*McDaniel I*, *supra*, 512 F.2d at 587). Moreover, as we discuss below, the court of appeals also misapplied the four factors identified in *Cort* v. *Ash*. Applying the *Cort* criteria in light of this Court's instructions in *Touche Ross* and *Transamerica*, we believe that Congress plainly intended the back-wage remedies expressly provided by the Davis-Bacon Act to be exclusive and that courts may not fashion additional private enforcement remedies they consider essential "to effectuate the intention of Congress in passing the statute" (*McDaniel II*, *supra*, 548 F. 2d at 695).

C. The four factors set forth in *Cort* v. *Ash*, *supra*, 422 U.S. at 78, are:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" * * *—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

As to the first factor, both the language of the Davis-Bacon Act and its legislative history indicate that laborers and mechanics on federal construction contracts are the "especial" intended beneficiaries of the statute. The committee reports on the Act explain that "[t]he purpose of this measure is to require contractors and subcontractors * * * to pay their employees the prevailing wage rates when such wage rates have been established by private industry." S. Rep. No. 1445, 71st Cong., 3d Sess. 1 (1931); H.R. Rep. No. 2453, 71st Cong., 3d Sess. 1 (1931). In 1935, the Act was amended to provide the enforcement provisions codified in 40 U.S.C. 276a–1 and 276a–2 after a Senate subcommittee reported that "unscrupulous contractors have taken advantage of the wide-spread unemployment among the buildings crafts to exploit labor and to deprive employees of the wages to which they were entitled under the law." H.R. Rep. No. 1756, 74th Cong., 1st Sess. 1 (1935). See also S. Rep. No. 1155, 74th Cong., 1st Sess. 1–2 (1935). And in 1964, the Act

was further amended to require the Department of Labor to consider fringe benefits in determining the level of prevailing wages. The Senate Report on the amendment states (S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964)):

> Almost from the inception of Federal construction activity Congress recognized the necessity for providing basic wage protection to local laborers and mechanics employed on the construction. It was precisely for the purpose of providing this protection that Congress passed the Davis-Bacon Act more than 30 years ago.

See also *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 178 (1954), where this Court noted that, "[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers." Accord, *Walsh* v. *Schlecht*, 429 U.S. 401, 411 (1977).

We also agree with the court of appeals that recognition of a private cause of action under the Davis-Bacon Act would not intrude the federal courts into an area that is basically the concern of the states. The failure to pay mechanics and laborers the prevailing wages required by the terms of a government construction contract could be challenged under state law by the employees as third-party beneficiaries of the contract (see page 17, note 14, *supra*). But a suit challenging the *failure to include* a prevailing-wage provision in a government contract requires a determination of the scope of the coverage of the Davis-Bacon Act and thereby implicates matters of federal rather than state policy.[16] Accordingly, the right of ac-

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[16] Moreover, as in *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 708–709, "it is the expenditure of federal funds that provides the justification for this particular statutory prohibi-

tion created by the court of appeals is not "one traditionally relegated to state law" (*Cort* v. *Ash*, *supra*, 422 U.S. at 78).

Outweighing these two factors, however, is the strong evidence of congressional intent to deny any remedy other than the enforcement provisions expressly contained in the Davis-Bacon Act. In *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974), the Court took note of "[a] frequently stated principle of statutory construction" that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." The presumption is that *expressio unius est exclusio alterius*. See also *Brown* v. *General Services Administration*, 425 U.S. 820, 829 (1976); *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 574; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, slip op. 8. While such a presumption "must yield to clear contrary evidence of legislative intent" (*National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, *supra*, 414 U.S. at 458), there is no such evidence in the legislative history of the Davis-Bacon Act.

Indeed, the available evidence is strongly to the contrary. The legislative history of the 1964 amendments to the Davis-Bacon Act indicates that Congress did not believe the Act then granted any implied right of private action for unpaid wages by employees against employers, and it rejected the opportunity to amend the Act to do so. While the 1964 amendments were

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tion. There can be no question but that this aspect of the *Cort* analysis supports the implication of a private federal remedy."

under consideration, Representative Goodell proposed a bill, H.R. 9590, 88th Cong., 2d Sess. (1964), that would have amended the Act to provide such a remedy. Representative Goodell sought to have the substance of H.R. 9590 considered in the House debate on H.R. 6041, 88th Cong., 1st Sess. (1964), a bill to amend the Act by defining prevailing wages to include fringe benefits. After extensive debate concerning whether the Davis-Bacon Act should allow for judicial review, the House voted to invoke the parliamentary rule against nongermane amendments, and it refused to consider Representative Goodell's proposal. 110 Cong. Rec. 1194–1204 (1964). Representative Goodell then introduced a second amendment to provide for judicial review only of fringe benefit determinations, and this amendment was defeated. 110 Cong. Rec. 1227–1228 (1964).[17]

More significant than the House action itself, however, is the fact that the members participating in the debate preceding the invocation of the nongermane rule explicitly voiced their belief that the Davis-Bacon Act contemplated no judicial review of agency decisions implementing the Act. That belief necessarily implies that there is no private right of action by employees to enforce the Act.[18] The disagreement among

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[17] The court of appeals in *McDaniel II* rejected the University of Chicago's reliance upon the fate of the first Goodell proposal (H.R. 9590), mistakenly asserting that that bill "dealt with the narrow issue of judicial review of the Secretary of Labor's determination of prevailing fringe benefits" (548 F.2d at 694).

[18] The focus of the debate was on the desirability of providing for judicial review of determinations of the Department of Labor under the Act—primarily wage determinations (see, *e.g.*, 110 Cong. Rec. 1197 (1964) (remarks of Rep. Goodell)), 1198

the participants in the debate was solely over whether the Act should be amended to permit judicial review. See 110 Cong. Rec. 1194–1204 (1964). Congress declined to add such a provision. This refusal strongly counsels against judicial creation of a private right of action by implication.

The court of appeals in *McDaniel II* nevertheless found an implied private right of action for the benefit of laborers and mechanics by reading the Davis-Bacon Act *in pari materia* with the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, as amended, 29 U.S.C. 251 *et seq.* The court relied particularly upon 29 U.S.C. 255, which imposes a two-year limitation on any cause of action for "unpaid minimum wages, unpaid overtime compensation, or liquidated damages" under the Fair Labor Standards Act, the Walsh-Healey Act, or the Davis-Bacon Act. Since the Miller Act imposes a one-year limitation on all suits on the contractor's bond (40 U.S.C. 270b(b)), the court reasoned that "[u]nless the Portal-to-Portal two year statute of limitations on Davis-Bacon actions is a nullity," Congress must have contemplated direct suits by employees against their

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(remarks of Reps. Griffin, Landrum, and Roosevelt), 1200 (remarks of Reps. Pucinski and Broyhill), 1201 (remarks of Rep. Fogarty), 1202 (remarks of Rep. Skubitz)). Nevertheless, several comments demonstrate the assumption that the Act precluded judicial review of *any* agency decision under the Act. See, *e.g.*, 110 Cong. Rec. 1197 (1964) (remarks of Rep. Goodell) ("The Davis-Bacon Act is the only Federal wage-fixing law on the books where you do not have a provision for aggrieved parties to get into the court and let the judge tell them what Congress meant when it wrote the law"). Accord, 110 Cong. Rec. 1200 (1964) (remarks of Rep. Broyhill); 1201–1202 (remarks of Rep. Bell). See also H.R. Rep. No. 308, 88th Cong., 1st Sess. 29–30 (1963) (dissenting views); S. Rep. No. 963, 88th Cong., 2d Sess. 4–5 (1964).

employers to enforce the provisions of the Davis-Bacon Act (548 F. 2d at 694).

The court of appeals appears to have read too much into the Portal-to-Portal Act. The limitations provision of that statute was not subjected to extensive legislative scrutiny at the time of enactment, and the reference in 29 U.S.C. 255 to the Walsh-Healey and Davis-Bacon Acts was itself an afterthought. When Congress enacted the Portal-to-Portal Act, it was primarily concerned with curtailing the flood of suits then being brought under the Fair Labor Standards Act after this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). See *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 61 (1953). The Senate bill (S. 70, 80th Cong., 1st Sess. (1947)) would have amended only the Fair Labor Standards Act "'to exempt employers from liability for portal-to-portal wages.'" S. Rep. No. 37, 80th Cong., 1st Sess. 1, 48 (1947). The House bill (H.R. 2157, 80th Cong., 1st Sess. (1947)) also included the Davis-Bacon Act and the Walsh-Healey Act. As the House Committee Report explained (H.R. Rep. No. 71, 80th Cong., 1st Sess. 5 (1947)):

> The Walsh-Healey Act also concerns itself in its field with minimum wages and overtime compensation. The Bacon-Davis Act has provisions relating to minimum wages and other conditions of employment. These two acts are therefore affected by the *Mount Clemens* decision. The situation described herein as to the Fair Labor Standards Act applies to that existing under the Walsh-Healey Act and the Bacon-Davis Act. The same necessity exists there for remedial legislation.

H.R. 2157 contained a one-year statute of limitations and thus was consistent with the enforcement provi-

sions of the Davis-Bacon Act. See 40 U.S.C. 270b(b) and 276a–2(b); H.R. Rep. No. 71, *supra*, at 7. In contrast, S. 70 provided for a two-year statute of limitations (S. Rep. No. 37, *supra*, at 48). Although the Senate Committee Report on H.R. 2157 agreed to the expanded coverage of the House bill, it retained the two-year limitation of S. 70. S. Rep. No. 48, 80th Cong., 1st Sess. 50–51 (1947). The two-year limitation was recommended by the conference committee (H.R. Rep. No. 326, 80th Cong., 1st Sess. 13–24 (1947)) and was enacted (Pub. L. No. 49, 61 Stat. 87).

There is no evidence anywhere in the legislative history of the Portal-to-Portal Act that Congress recognized that the new statute created two incompatible periods of limitation under the Davis-Bacon Act.[19] To the contrary, it appears that Congress proceeded upon the erroneous premise that "there is no limitation provision in either the Walsh-Healey or the Bacon-Davis Acts." S. Rep. No. 48, *supra*, at 42.[20] The amendment

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[19] The congressional debates on the Portal-to-Portal Act demonstrate the same unfamiliarity with the Davis-Bacon Act that is reflected in the committee reports. In the Senate debate on the House bill, Senator Donnell, a subcommittee member, indicated that he did not recall that the Davis-Bacon Act had been mentioned in the Senate subcommittee hearings on the legislation. 93 Cong. Rec. 2124 (1947); see also 93 Cong. Rec. 2083 (1947) (statement of Sen. Wiley); 93 Cong. Rec. 2250, 2253 (1947) (remarks of Sen. McGrath). However, the Senate subcommittee agreed with the House subcommittee that the Davis-Bacon Act and the Walsh-Healey Act should be included in the two-year statute of limitations of the Portal-to-Portal Act, as explained by Senator Wherry, "for the simple reason that [they] involve payments for hours worked." 93 Cong. Rec. 2193 (1947).

[20] During the debates, Senator McGrath argued that a two-year period of limitation was too short, because "the administrative [claim] procedures which are necessary to determine the

to the Portal-to-Portal Act was intended simply to correct this asserted deficiency by "setting up a 2-year statute of limitations." *Id.* at 51.[21]

Moreover, it would be surprising if Congress had assumed the existence of an implied private cause of action under the Davis-Bacon Act in 1947. The Davis-Bacon Act's explicit private enforcement provisions incorporate those of the Miller Act (see page 4, *supra*). The Miller Act in turn derived from the Heard Act (Act of August 13, 1894, ch. 280, 28 Stat. 278). At the time the Miller Act was adopted, the statutory action on the required bond had been held to be the exclusive means of enforcing the Heard Act. See *United States to Use of Zambetti* v. *American Fence Construction Co.*, 15 F. 2d 450 (2d Cir. 1926); *United States* v. *Montgomery Heating & Ventilating Co.*, 255 F. 683 (5th Cir. 1919); *Strong* v. *American Fence Construction Co.*, 245 N.Y. 48, 156 N.E. 92 (1927).[22] After the

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validity of the workman's claim for back wages under the Davis-Bacon Act frequently take a considerable length of time which may very easily run for a period of more than 2 years." 93 Cong. Rec. 2252 (1947). Senator McGrath's statement is significant because it indicates that the limitation in the Portal-to-Portal Act was intended to apply to the explicit statutory remedy provided in the Davis-Bacon Act, not to any implied right of action by employees against employers as assumed by the court of appeals in *McDaniel II* (548 F. 2d at 694).

[21] It is difficult to perceive any reason why Congress would have intended to establish two inconsistent statutes of limitations, particularly when the result would be to permit employees direct access to the courts under the Portal-to-Portal Act without satisfying the time limitations or following the administrative procedures contemplated by the express Davis-Bacon Act remedy. See *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 574; *Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833.

[22] In *Strong*, Judge Cardozo stated (245 N.Y. at 52, 156 N.E. at 93):

enactment of the Portal-to-Portal Act, the Miller Act also was so construed. See *Harry F. Ortlip Co. of Pennsylvania* v. *Alvey Ferguson Co.*, 223 F. Supp. 893, 894 (E.D. Pa. 1963); *Gallaher & Speck, Inc.* v. *Ford Motor Co.*, 226 F. 2d 728, 731 (7th Cir. 1955).[23] There is no apparent reason why Congress would have disagreed with this consistent line of cases, much less why it would have expressed its disagreement covertly in the subtle manner attributed to it by the court of appeals in *McDaniel II*. Cf. *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 694–699.[24]

> Congress has said that contractors shall be liable to materialmen and laborers in an amount to be made determinate by the giving of the bond. The statutory liability, which in turn is inseparably linked to the statutory remedy, assumes the existence of a bond as an indispensable condition. Till then, there is neither Federal jurisdiction nor any right of action that can rest upon the statute.

[23] These decisions merit consideration here because of the parallelism between the Miller and Davis-Bacon Acts. The Miller Act requires the contractor to furnish a bond for the benefit of laborers and materialmen on certain government construction contracts, while the Davis-Bacon Act sets the minimum wages that the contractors may pay to laborers and mechanics under similar contracts. Compare 40 U.S.C. (and Supp. II) 270a with 40 U.S.C. 276a. The remedy under either Act is the action on the bond provided by 40 U.S.C. 270b (see 40 U.S.C. 276a–2(b)). If a private right of action in favor of laborers and materialmen cannot be inferred from the obligations imposed on contractors under 40 U.S.C. (and Supp. II) 270a, there is no reason to infer a similar private right of action in favor of laborers and mechanics from the obligations imposed under 40 U.S.C. 276a, especially since essentially the same facts that render a contract subject to one Act also render it subject to the other.

[24] When Congress intended to permit private suits by employees to enforce federal statutory requirements concerning working conditions, it knew how to do so explicitly. See 29 U.S.C. 216 (Fair Labor Standards Act). The failure to include such an explicit provision in the Davis-Bacon Act thus is itself some evidence that no such right should be implied. See *Willis* v. *E.I.*

It would also be inconsistent with the legislative scheme to imply a private enforcement remedy under the Davis-Bacon Act. As we have discussed above (pages 3–8, *supra*), the Act requires the contracting agency to include, in the specifications for covered federal construction contracts, the Secretary of Labor's determination of the prevailing wages for construction workers on similar projects in the locality involved, and to incorporate into the contracts based on these specifications a stipulation that the contractor will pay at least those wages to all mechanics and laborers employed on the site. 40 U.S.C. 276a. In addition, the contract must permit the contracting officer to withhold from the amount due the contractor any amount necessary to assure that such laborers and mechanics are paid at the prevailing rates (*ibid.*). If the amount withheld is insufficient, the laborers and mechanics are granted the explicit right to sue on the payment bond required by the Miller Act (40 U.S.C. (and Supp. II) 270a) to recover the prevailing wage specified in the government contract (40 U.S.C. 276a–2(b)). The Davis-Bacon Act thus not only specifies the obligation of the contracting agency and the contractor but also describes the means available to the employee to assure that he receives the benefits of the Act where a contract includes Davis-Bacon provisions. Nothing in the legislation suggests that Congress intended to permit the disruption of the performance of govern-

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Du Pont de Nemours & Co., 76 F. Supp. 1010 (E.D. Okla.), rev'd on other grounds, 171 F. 2d 51 (10th Cir. 1948). See also *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 571–572; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, slip op. 9; *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 730 (Powell, J., dissenting).

ment contracts by suits against a contractor challenging an agency's failure to include Davis-Bacon Act provisions in a contract alleged to be covered by the Act.

The disruption that would occur from implication of a private right of action would be substantial. As we have noted above, the Davis-Bacon Act and approximately 60 related statutes impose prevailing wage requirements upon most federal and federally-assisted construction contracts of all types (competitively bid, negotiated, fixed cost, cost plus, etc.) entered into or administered by government contracting agencies.[25] The enforcement of the Acts is governed by Reorganization Plan No. 14 of 1950 (5 U.S.C. App., at 746), which vests overall administrative responsibility in the Secretary of Labor to achieve coordination and consistency. But that consistency would be unattainable if the decision below were to result in a proliferation of suits by disgruntled contractor employees against their employers, with numerous federal courts becoming the arbiters of coverage determinations.

If a district court were to conclude, after a government contract had been entered into, that a laborer was entitled to be paid at the prevailing wage rate for construction workers because he was performing covered construction work, the contractor and the government would be forced either to reclassify similar jobs under the contract for the future or face the continued accrual of potential liability for back wages. In

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[25] We do not, of course, foreclose the possibility of an implied private cause of action under any of the related statutes, which do not provide for a remedy similar to a suit on the Miller Act bond.

turn, reclassification might suggest the necessity for substantial alteration of the coverage guidelines, which would entail difficult decisions about what work is sufficiently similar to that performed by the plaintiff to require reclassification.[26] Moreover, opening the provisions of existing contracts to judicial scrutiny for compliance with the Davis-Bacon Act would inevitably subject contractors to jurisdictional disputes between unions that represent construction workers and those that represent maintenance or other nonconstruction workers.

Federal budgeting would also be adversely affected by a determination, after a cost-plus contract has been let, that the higher construction wages must be paid even though such wages were not contemplated when the contract was let. Fixed-price procurement, too, would be adversely affected by the possibility of such a determination. The possibility of post-contracting challenges, with the concomitant potential for delays in performance due to court suits, injunctions, and efforts to reach administrative settlements, would significantly increase a bidder's uncertainty about what it would cost to perform the contract. This might discourage some potential bidders from competing for government contracts and might lead others to submit higher bids reflecting the possibility of increased costs.

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[26] These coverage decisions themselves would be subject to review in other suits, with all the possibilities for conflicting decisions that such review implies. At best, the courts and the agency would be faced with the task of harmonizing a proliferating number of decisions dealing with infinitely varying facts.

Finally, courts simply lack the expertise to make independent determinations in this area.[27] As we have explained earlier (pages 10–11, *supra*), DOE, the contracting agency involved here, has developed illustrative guidelines for determining what work constitutes "construction work" within the meaning of the Davis-Bacon Act under the complex research and development contracts that it administers. These guidelines (many of which have been approved by the Department of Labor) are applied to specific projects by special committees composed of members with technical, administrative and legal expertise. Under the contract in dispute here, which expressly provided that petitioner would not perform Davis-Bacon work, any work that the committee determined was subject to Davis-Bacon requirements was contracted out. Permitting the courts to overturn the committee's decisions in this highly technical area after the subcontract has been performed would be particularly inequitable in these circumstances. Respondent and the class he represents performed the disputed work only because it had been determined *not* to be subject to Davis-Bacon requirements. Suits by such employees, which could involve millions of dollars in back wages, brought

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[27] Thus, even if the Davis-Bacon Act affords employees a private right of action to challenge the omission of prevailing wage stipulations from their employers' contract with the government, the district courts should not make *de novo* determinations concerning whether the contract was one for "construction, alteration, or repair work" requiring the inclusion of such stipulations, but should stay proceedings under the doctrine of primary jurisdiction until the agencies concerned have made the initial coverage determinations. We have discussed this issue at greater length in our amicus brief (pages 17–23) at the petition stage in this case.

long after Davis-Bacon determinations have been made and the work has been performed in reliance on the accuracy of those determinations, would unfairly expose the contractor or the government to substantial costs in excess of those contemplated.

For all these reasons, Congress, when it provided specific administrative remedies and a limited judicial remedy (the suit on the Miller Act payment bond) for the enforcement of Davis-Bacon Act prevailing wage provisions, did not authorize employee-contractor suits, such as this one, that would require courts to make *ex post facto* coverage decisions in place of the agencies involved. Congress could scarcely have intended a private right of action of this type but "absentmindedly forgot to mention" it. *Cannon* v. *University of Chicago, supra*, 441 U.S. at 742 (Powell, J., dissenting). See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, slip op. 8. There is, instead, a strong suggestion that Congress did not intend to impose any monetary liability upon employers to reimburse employees for Davis-Bacon work performed under a contract that does not contain an express provision requiring payment of prevailing wages.

In sum, we conclude that two of the four criteria set forth in *Cort* v. *Ash* are met here—*i.e.*, respondent is one of the class for whose especial benefit the statute created a federal right, and federal, rather than state, law should control the assertion of that right. However, the remaining two criteria are plainly not satisfied, and it is those criteria that are most critical to the question of whether a private enforcement action should be implied. There are significant indications of a

legislative intent to limit the remedies under the Davis-Bacon Act to those expressly provided, and it would be inconsistent with the legislative scheme to find an implied private remedy in favor of employees against the contractor where no prevailing wage determination is in the contract because the agency has determined that the Act is not applicable. These factors are fatal to respondent's claim, since "[t]he central inquiry [is] whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, slip op. 4. Accordingly, if there is a need for a further private enforcement remedy under the Act, it should be supplied by Congress and not the courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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